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Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

RIVERSIDE CEMENT CO.,

PETITIONER

v.

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-192, AFL-CIO,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that "plausibility" is the legal test for requiring a trial court to litigate, and reach a factual conclusion, on whether a union's demand for arbitration over modification to benefits provided to retirees does or does not fall within an arbitration provision of a collective bargaining agreement?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Riverside Cement Company ("RCC") is a California general partnership. RCC's two general partners are TXI Riverside, Inc. and TXI California, Inc., which are both privately held corporations incorporated in the state of Delaware. No publicly held company owns ten percent or more of RCC's partnership interest. TXI Riverside, Inc. and TXI California, Inc. are owned 100% by Texas Industries, Inc, which is a publicly held corporation incorporated in the state of Delaware.

TABLE OF CONTENTS

QUESTION PRESENTED i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE PETITION 4
I. THE NINTH CIRCUIT'S STANDARD FOR DISMISSAL CONFLICTS WITH THE DECISIONS OF THIS COURT 4
A. Retirees Are Not Employees For Purposes Of The National Labor Relations Act Or The Recognition Clause Of A Collective Bargaining Agreement 4
B. The Ninth Circuit's "Plausibility" Standard Conflicts With The Decisions Of This Court 7
CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Allied Chemical & Alkali Workers Local I v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 4, 5, 6

Building Materials and Construction Teamsters Local No. 216 v. Granite Rock Co., 851 F.2d 1190 (9th Cir. 1988), cert. denied, 488 U.S. 986, 109 S.Ct. 543 (1988) 7

California Union Ins. Co. v. American Diversified Sav. Bank, 948 F.2d 556 (9th Cir. 1991) 9

Conley v. Gibson, 355 U.S. 41 (1957) 7

Contra Costa Legal Assistance Workers v. Contra Costa Legal Services Foundation, 878 F.2d 329 (9th Cir. 1989) 7

Litton Financial Printing Div. v. National Labor Relations Board, 501 U.S. 190 (1991) 7

United States v. Moorman, 338 U.S. 457 (1950) 7, 8

United Steelworkers of American v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 8

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum Opinion and Order of the U.S. Court of Appeals for the Ninth Circuit, dated June 19, 2007 is reproduced at App. A, 1a-5a.

The Memorandum Opinion and Order of the U.S. District Court for the Central District of California (Phillips, V.) is reproduced at App. B, 6a-11a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was entered on June 19, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Defendant, RCC manufactures cement at its Oro Grande Facility in Oro Grande, California. Plaintiff, Paper, Allied-Industrial Chemical and Energy Workers International Union, Local 8-192, AFL-CIO ("PACE") is a labor organization and the exclusive bargaining representative for all production and maintenance employees employed by RCC at its Oro Grande Facility.

A collective bargaining agreement ("CBA") exists between RCC and PACE. The recognition clause of the CBA, Article I, provides that RCC recognizes PACE as "the sole representative for purposes of collective bargaining with respect to wages, hours, and working conditions for all employees as defined herein at its Oro Grande, California plant. . ." (Excerpts of Record ("ER") 43.) This section goes on to define the term "employees" to include, "all production and maintenance *employees* employed by the employer at its Oro Grande, California facility." (ER 43, emphasis added). The section concludes with the following exclusionary statement: "The article[s] hereinafter set out shall apply to all *employees* in the above described unit . . ." (ER 44, emphasis added). There are no specific references anywhere in the CBA to retirees, retired employees, or to any benefit plans regarding retirees.

The Grievance Procedure of the CBA establishes a process, culminating in binding arbitration, for the resolution of disputes between RCC and PACE "with regard to the meaning or application of this Agreement." (ER 70.)

On May 13, 2005, PACE filed a complaint against RCC in the District Court of California, seeking to compel RCC to arbitrate a grievance submitted by PACE regarding RCC's refusal to negotiate over changes to the benefits it provides to retired employees. (ER 1.)

In the District Court, RCC moved to dismiss Plaintiff's complaint under Rule 12(b)(6) on the ground, *inter alia*, that Plaintiff's factual allegations do not support a claim for specific performance because no contractual duty toward retirees existed under the CBA and because the term "employee" as used in the recognition clause of a CBA excludes retirees. The District Court granted RCC's motion to dismiss. App. 6a-11a. The District Court reasoned that because the arbitration clause at issue was not susceptible to an interpretation covering disputes over retirees, RCC had established that Plaintiff could prove no set of facts in support of its claim that would entitle it to the relief sought. App. 10a-11a.

Plaintiff appealed the District Court's granting of RCC's motion to dismiss to the United States Court of Appeals for the Ninth Circuit. On June 19, 2007, the Ninth Circuit reversed and remanded the order of the District Court granting RCC's motion to dismiss. The Ninth Circuit held that the complaint could not be dismissed because "it is at least plausible that the CBA was intended to cover both current and former employees." App. 5a.

RCC petitions this Court for review of the decision of the Ninth Circuit holding that as used within the recognition clause of a CBA the term "employee" is "susceptible of meaning both currently 'employed' and previously 'employed'

[members of the bargaining unit]," and that a complaint may not be dismissed where it is "at least *plausible* that the CBA was intended to cover both current and former employees." App. 4a-5a (emphasis added).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's "plausibility" rule is contrary to the decisions of this Court regarding dismissal of a complaint for specific performance of a contractual duty to arbitrate. The Ninth Circuit's rule also subjects the employer to the burdens of litigation and, potentially, arbitration even though the plaintiff is unable to allege facts that meet the requirements set by the National Labor Relations Act and this Court.

This Court should grant certiorari to address the important question of whether the term "employee" as used in the recognition clause of a CBA includes retirees and to correct the unwarranted plausibility rule adopted by the Ninth Circuit.

I. THE NINTH CIRCUIT'S STANDARD FOR DISMISSAL CONFLICTS WITH THE DECISIONS OF THIS COURT

A. Retirees Are Not Employees For Purposes Of The National Labor Relations Act Or The Recognition Clause Of A Collective Bargaining Agreement

In *Allied Chemical & Alkali Workers Local I v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971), this Court held that retired employees are not employees within the meaning of the NLRA and therefore, there is no requirement that an employer bargain regarding the benefits received by the employees who had retired and, further, that the employer is entitled to unilaterally alter retiree

benefits without bargaining with the union beforehand. *Id.* at 180.

This Court further held that retirees were not, and could not, be "employees" included in the bargaining unit because the unit was composed of "employees of the Employer's plant . . . working on hourly rates, . ." *Id.* at 172.[1]

As set forth above, the recognition clause in this matter is virtually identical that that at issue in *Allied Chemical* and is confined to employees employed by the employer at a single facility.[2]

In reversing the decision of the District Court, the Ninth Circuit found that "the phrase '*employed* by the employer' – which is used to describe who is covered – is susceptible of meaning both currently 'employed' and previously 'employed.'" App. 5a. (emphasis in original). This finding by the Ninth Circuit ignores both the text of the recognition clause and the decision of this Court in *Allied Chemical.*

Under the express terms of the CBA, the "Company recognizes the Union as the sole representative for purposes of collective bargaining with respect to wages, hours, and working conditions for all. . . production and maintenance

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[1] The bargaining unit at issue in *Allied Chemical* was defined to include "all employees of the Employer's plant and limestone mine at Barberton, Ohio, working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors. . ." *Allied Chemical, supra,* at 161 n. 1.

[2] Article 1.2 of the CBA provides: "The Company recognizes the Union as the sole representative for purposes of collective bargaining with respect to wages, hours and working conditions for all employees as defined herein at its Oro Grande plant. . ." As certified by the National Labor Relations Board, the covered employees include "All production and maintenance employees employed by the employer at its Oro Grande, California Facility." (ER 43).

employees employed by the employer at its Oro Grande, California facility." (ER 43), Thus, the very text of the recognition clause confines the scope of the CBA to wages, hours and working conditions of employees.

Additionally, this Court has taught that "the ordinary meaning of 'employee' does not include retired workers; retired employees have ceased to work for another for hire." *Allied Chemical*, at 168. The Ninth Circuit ignores the ordinary meaning of the term "employee" when it finds that term is susceptible of meaning those who were "previously employed," -- in other words: "retirees." Doing so, however, would "utterly destroy the function of language [if read] as embracing those whose work has ceased with no expectation of return." *Id.* at 172.

The finding of the Ninth Circuit that the phrase "employees employed by the employer" within a recognition clause is susceptible of meaning those "previously employed" further conflicts with the holding of this Court that "retirees [can] not properly be joined with active employees in the [bargaining] unit that the Union represents" *Allied Chemical*, at 172, because a unit composed of active and retired workers would be "inappropriate" under the NLRA.

Accordingly, retirees are not employees for purpose of the CBA at issue in this matter and the finding of the Ninth Circuit that the phrase "employees employed by the employer" is susceptible of meaning both those currently employed and previously employed conflicts in multiple ways with the decision of this Court in *Allied Chemical*.

B. The Ninth Circuit's "Plausibility" Standard Conflicts With The Decisions Of This Court

A motion to dismiss for failure to state a claim is properly granted where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

An action to compel arbitration under a collective bargaining agreement is, in essence, a suit to compel specific performance of a contractual term (i.e., the arbitration agreement) and such an action is properly dismissed where it fails to set forth facts establishing a duty to arbitrate the grievance at issue because "arbitration is a matter of consent, and [. . .] it will not be imposed upon parties beyond the scope of their agreement." *Litton Financial Printing Div. v. National Labor Relations Board*, 501 U.S. 190, 201 (1991).

Further, the intention of parties to submit a particular subject matter to final determination outside the courts is one that "should be made manifest by plain language." *United States v. Moorman*, 338 U.S. 457, 462 (1950).

Arbitration is not required whenever a party merely asserts that another party has breached a collective bargaining agreement. "Nothing in our jurisprudence requires an employer who has not agreed to submit all contractual disputes to arbitration to submit any of its policies or decisions to the scrutiny of an arbitrator. The parties, not the courts, decide whether and to what extent their disputes will be subject to binding arbitration...." *Contra Costa Legal Assistance Workers v. Contra Costa Legal Services Foundation*, 878 F.2d 329, 330 (9th Cir. 1989), quoting *Building Materials and Construction Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194-95 (9th Cir. 1988), cert. denied, 488 U.S. 986, 109 S.Ct. 543 (1988).

Here, the Ninth Circuit denied petitioner's motion to dismiss because it found "it is at least *plausible* that the CBA was intended to cover both current and former employees." App. 5a (emphasis added). The manner in which the Ninth Circuit applied its "plausibility" test shows that the test does not require either that the intention of the parties to submit the subject matter of the dispute to arbitration be "made manifest by plain language," *Moorman, supra,* 338 U.S. at 462, or that the arbitration clause is susceptible to an interpretation that covers the alleged dispute." *United Steelworkers of American v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

In support of its finding that the CBA at least plausibly covers changes to retiree benefits, the Ninth Circuit points to two provisions of the agreement: (1) the recognition clause, and (2) Appendix B. The Ninth Circuit concedes that "the terms of the agreement do not speak specifically of 'retired' employees." App. 5a. The two provisions of the agreement relied upon by the Ninth Circuit also do not support a finding that retirees are covered under the agreement. First, as set forth above, the recognition clause is confined to employees, not retirees. Second, Appendix B, also makes no reference either to retirees or to retiree benefits it sets forth only those benefits available to employees employed by the employer at the Oro Grande facility.

In sum, the "plausibility" test omits the requirement of this Court that the parties must manifest an intent to submit the subject matter of the dispute to arbitration.

While this Court has clearly announced its preference for the use of arbitration provisions in collective bargaining agreements as a means of achieving industrial peace, see, *United Steelworkers of American v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 577-78 (1960), permitting a party to

defeat a motion for dismissal merely by mention of the magic word "dispute" and then asserting the "plausibility" of their position, would undermine this very policy because employers would then be reluctant to adopt broad arbitration clauses. In fact, it would no longer make arbitration a matter of contract, it would make it a matter of right. This Court has never so held.

A union cannot defeat a motion to dismiss a complaint seeking to compel arbitration simply by designating a term specifically defined within the CBA as ambiguous and then asserting a "plausible" argument that this "ambiguity" exists. Where, as here, the plain language of the agreement is clear, a party should not be able to rely on unsupported and baseless claims of a "plausible dispute" in order to create an ambiguity where none exists. *See*, *California Union Ins. Co. v. American Diversified Sav. Bank*, 948 F.2d 556 (9th Cir. 1991) (courts are not required to "adopt a strained or absurd interpretation in order to create an ambiguity where none exists").

CONCLUSION

For the foregoing reasons, Petitioner urges this Court to grant a writ of certiorari in this case.

Respectfully submitted.

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